Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

In order for one of the principal goals of theTelecommunications Act of 1996 to be realized -- introduction of competition into local exchange markets dominated by incumbent LECs -- *facilities-based* new entrants such as Hyperion Telecommunications, Inc. ("Hyperion"), must be able to gain competitive entry to local exchange markets. To be able to accomplish this, facilities-based new entrants like Hyperion require the Commission to establish national, minimum standards for interconnection, access to unbundled network elements, and acceptable pricing levels in this rulemaking. Hyperion's comments address the following issues:

INTERCONNECTION OF NETWORKS UNDER SEC. 251 - As part of a national, minimum standard for interconnection, the Commission must first define the duty to negotiate in good faith and implement an enforcement mechanism that will serve as a disincentive for incumbent LECs to use Sec. 252 negotiations to delay interconnection agreements and competition from new entrants. Second, the Commission should not implement a "similarly situated carrier" requirement for Sec. 252(i), which is contrary to the express language of the Act. Such a rule would also encourage incumbent LECs to discriminate against new entrants by using "similarly situated carrier" as a pretext to refuse to agree to extend interconnection agreements (and deny competitive entry) to certain carriers, harming the introduction of local competition. Further, Sec. 252(i) also requires that requesting carriers be able to access individual terms of agreements should they want to request something less than the terms of an entire agreement. Third, new entrants should have the ability to interconnect with an incumbent LEC "at any technically feasible point" within the incumbent LEC's network, which should be liberally defined by the Commission to include all technically feasible points ranging from the incumbent LEC's premises to the requesting carrier's premises, and all points in-between. Further, in the event of a dispute, a heavy burden should be on the incumbent LEC to demonstrate that a requested interconnection point is not technically feasible. The Commission should also encourage a variety of *forms* of interconnection, including physical collocation, virtual collocation and meet-point arrangements, adopting a rule requiring the incumbent LECs to honor the interconnection request of the new entrant unless doing so is technically infeasible.

COLLOCATION - The Commission should broadly define the "premises of the local exchange carrier" to include all LEC offices, structures, and network facilities

on rights of way to facilitate the objectives of the Act. Similarly, new entrants, particularly those operating in high cost, rural, low population areas, should be able to request collocation of their equipment at any interconnection point technically feasible for both the new entrant and incumbent, subject to space availability.

UNBUNDLED NETWORK ELEMENTS - The Act does not empower States to require that new entrants unbundle their network elements. This is an express "*additional obligation*" of incumbent LECs, not new entrants. Network elements should also be broadly defined to include network elements and any combination or subdivision of a "facility or equipment used in the provision of a telecommunications service."

PRICING - The Commission must define the Act's pricing standards and provide resulting rate structures for interconnection, unbundled elements, and collocation consistent with Sec.252(e)(6). A national pricing standard must be set at incremental cost, in accordance with Sec. 252(d)(1), and exclude all joint, common, or overhead costs, or any contribution. Finally, the Commission's rules should formally adopt bill and keep as the method of compensation for the termination of traffic between carrier networks as the most cost effective method currently available for new entrants and will promote local exchange competition.

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I. INTRODUCTION

Hyperion Telecommunications Company, Inc. ("Hyperion"), by its undersigned counsel, hereby submits its comments on the *Notice of Proposed Rulemaking* in the above-captioned docket (FCC 96-182, released April 19, 1996) (the *"NPRM"*).[1] The Commission established this proceeding to implement the local competition provisions of the Telecommunications Act of 1996,[2] and in particular to establish regulations as required by Sec. 251(d)(1). Hyperion, a facilities-based carrier of competitive local exchange and access services ("CLEC"), provides service to end-user customers in ten states in the eastern United States. Hyperion has a strong interest in the Commision promulgating rules designed to ensure that competitive conditions exist in the local exchange marketplace that will allow new entrants such as Hyperion to be able to compete as facilities-based carriers against the market power of the incumbent local exchange carrier monopolies ("incumbent LECs"). Hyperion's interest in this proceeding is particularly acute because whether it will be successful in becoming a full service provider of inbound and outbound local exchange services will heavily depend upon the regulations that the Commission implements in this proceeding.

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[1] As directed in para. 291 of the *NPRM*, each section of these comments corresponds to a specific portion of the *NPRM*. Paragraphs of the *NPRM* are cited as "para. ---."

[2] Pub. L. 104-104 110 Stat. 56 (hereinafter the "Act"). Sections of the Communications Act of 1934 as amended by the 1996 Act are cited as "Sec. ---."

II. OVERRIDING PRINCIPLES

A. The Commission Must Act Decisively

In addressing the many specific issues outlined in the following sections of these comments, Hyperion recommends that the Commission be guided by some general, overriding principles. First and foremost, as the Commission has already recognized (paras. 1-2, 6-8), a key goal of the 1996 Act is to open local exchange markets to competition, and the Commission must act decisively to remove any legal or practical barriers to such competition. Any policy that is effective in promoting competition *must* also create opportunities for competitors that did not previously exist. Indeed, the very survival of many competitors such as Hyperion will largely depend upon the outcome of this rulemaking. Further, the Commission must not be too eager to "balance" incumbent LECs' and competitors' interests. The Act gave the incumbent LECs many valuable opportunities to enter new markets, but the introduction of local exchange competition was expressly required as the price for entry into these new markets. *See* Sec. 271. The Commission should resist the efforts of incumbent LECs and others to expand the application of the local competition requirements Congress established for the incumbent LECs to new entrants.

Hyperion, like many other CLECs, has been engaged in extensive, prolonged, and costly interconnection and unbundled network access negotiations with incumbent LECs for the past two years -- both pursuant to individual state legislation and, since February, 1996, pursuant to the Act. *See* Sec. 252(a). While some limited progress has been made in negotiations, overall Hyperion has had very mixed results in its negotiations with incumbent LECs to obtain unbundled network access interconnection. As the Commission has accurately observed, "incumbent LECs have vastly superior bargaining power in negotiations for mutual termination." Para. 8 n.19. Negotiations in

certain states have been at a virtual standstill notwithstanding the Act's provision of new market opportunities for incumbent LECs negotiating interconnection and unbundled network access agreements with a facilities-based competitor such as Hyperion.[3] *See* Sec. 271. Furthermore, in the states in which it has invested substantial time and resources attempting to negotiate interconnection and unbundling rates, terms and conditions, Hyperion has observed that the incumbent LEC has sometimes taken inexplicably inconsistent negotiating positions concerning interconnection and unbundled elements from state to state within an incumbent LEC's region. Hyperion is deeply concerned that if its recent experience with incumbent LEC interconnection and unbundled element negotiations continues, it will be severely hampered in its ability to provide true facilities-based competition to any incumbent LEC in any of the local exchange markets in which Hyperion could otherwise compete. The Commission should take this opportunity to clarify that national, minimum standards for interconnection, access to unbundled elements, and pricing are to be implemented to avoid new entrants having to absorb the burden, expense, and delay in obtaining competitive entry to local exchange markets.

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[3] Among other provisions of a sweeping revision of the communications laws affecting the telecommunications (local exchange and interexchange carrier), cable and broadcast industries, it establishes a competitive checklist consisting of an extensive set of mandatory interconnection requirements which must be provided by the "Bell Operating Company" ("BOC"), to other telecommunications carriers before the Commission may grant approval for the BOC to provide interlata services. Thus, the Act essentially establishes a *quid pro quo* for the incumbent LEC, typically a BOC, of incentives (authority to enter the market for interlata services), in return for the incumbent LEC undertaking specific measures -- such as providing or generally offering "access and interconnection to its network facilities" and meeting a detailed competitive checklist -- to permit the onset of local exchange competition. *See* Sec. 271.

B. Congress Intended to Encourage Facilities-Based Competition

A second, overriding principle that should guide the Commission is that Congress specifically intended to encourage *facilities-based* competition in the local exchange market. Sec. 271(c)(1)(A) permits a Bell operating company to offer in-region interLATA service only if it is competing with an exclusively or predominantly *facilities-based* competitor. This provision reflects Congress's belief that only facilities-based competition (as opposed to pure resale of incumbent LEC services) will ensure a competitive local exchange telecommunications environment.[4] Congress had the foresight to provide additional incentives to facilities-based competition, for only a facilities-based entrant offers the prospect of being able to provide telecommunications facilities more efficiently than the incumbent, and thereby reduce the cost to society of providing such facilities. This both provides the facilities-based entrant with a means of reducing price to the consumers that is unavailable to a pure reseller, and imposes competitive pressure upon the incumbent (which a reseller is unable to impose) to minimize its costs of providing facilities. It is therefore not sufficient to adopt policies that remove inefficient barriers to entry; the Commission must also consider whether there are inefficient barriers to *facilities-based* entry.

The Commission in this rulemaking should set uniform, minimum standards of interconnection requirements and unbundled network access, at acceptable pricing levels. This will help ensure that facilities-based CLECs will uniformly have interconnection and access to unbundled network

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[4] This interpretation of Congressional intent is confirmed by statements in the legislative history. In supporting the House bill, for example, Representative Goodlatte stated that it "gives new entrants the incentive to build their own local facilities-based networks rather than simply repackaging them and reselling the local services of the local telephone company. This is important if the information superhighway is to be truly competitive." 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995).

elements at pricing that will allow local exchange competition to develop. Hyperion strongly agrees with the Commission's tentative conclusion that "uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements." (Para. 50). Hyperion also concurs with the Commission's related conclusion that there should be uniform minimum rules for the unbundling of network elements. (Para. 79).[5] Minimum unbundling requirements would also substantially reduce the collective inefficiency to new entrants of engaging in protracted but fruitless negotiations that lead to litigation on a state-by-state basis in countless state proceedings (proceedings which are bound to multiply once arbitration proceedings commence under Sec. 252(b) of the Act):

> Commission minimums would reduce or eliminate the need for certain duplicative decision-making by the states, provide a ready framework for the many states that have not acted to unbundle LEC networks, and speed the negotiation and arbitration processes by reducing any ambiguity in the parties' obligations. Thus, states could rely on a set of generally applicable minimum requirements, while prescribing additional rules of unbundling tailored to their particular circumstance.

Id.

Hyperion strongly supports the Commission's tentative conclusions concerning the need for uniform, minimum rules to speed the negotiation process and to minimize areas of dispute due to a lack of specific rules or the absence of any adopted standards. (*See* para. 50). There is truly an *urgent* need for the FCC to issue these minimum interconnection, unbundling, and pricing standards to prevent local exchange competition from stagnating or being curbed, and to prevent a skewed

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[5] Concerning uniform, minimum rules governing unbundled network elements, the Commission observes: "minimum national requirements governing the unbundling of network elements would likely offer several advantages...[including] uniform technical requirements, and would enhance the ability of new entrants to take advantage of economies of scale and to plan and deploy networks stretching across state and LEC boundaries." (Para. 79).

assortment of varied rules from developing in the states. The rules this Commission adopts will likely have a significant impact on the competitive landscape within local exchange markets and will determine to what degree local exchange competition will be able to develop in the future.

Though many sections of the comprehensive *NPRM* merit comment, because of Hyperion's relatively small size and limited resources, it will focus instead upon those aspects of the rulemaking that are most critical to Hyperion's ability to compete with incumbent LECs.

III. INTERCONNECTION OF NETWORKS UNDER SEC. 251

A. The Commission's Rules Should Act as a National Standard for Interconnection (NPRM, ¶¶ 50, 157)

Hyperion concurs with the Commission's tentative conclusion that there should be national rules for evaluating interconnection agreements (Para. 50). Congress intended for the interconnection regime under Sec. 251 to serve as a national standard, as the text of the Act indicates. Section 252(e)(6) gives carriers disgruntled by results of the negotiation process the right to bring an action in federal court asserting that the rulings of a state commission do not comport with Sec. 251.[6] Sec. 252(e)(6). Further evidence that Congress intended that the Commission's rules under Sec. 251 would also act as a national standard is found in the Act's enabling language governing the Commission's authority to implement Sec. 251:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
>
> (A) establishes access and interconnection obligations of local exchange carriers;

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[6] The national standard created by Sec. 252(e)(6) applies as well to the pricing interconnection and unbundled network elements under Sec. 252(d). For further discussion of this point, see II.A below.

> (B) *is consistent* with the requirements of this section; and
>
> (C) *does not substantially prevent implementation* of the requirements of this section and the purposes of this part.

Section 251(d)(3) (emphasis added). As this provision demonstrates, Congress expected the Commission to ensure a uniform national interconnection standard through preemptive rulemakings under the Act. Congress thus sought to protect state regulations that are "consistent" with, and do "not substantially prevent" implementation of, Sec. 251. In doing so, Congress emphasized that the Commission may — and most likely should — preempt state regulations that are inconsistent with Sec. 251 or otherwise substantially impede its implementation. In light of Congressional intent, the Commission's rules ought to serve as a national interconnection standard.

Sound policy also militates in favor of national interconnection standards. Negotiations will inevitably be delayed by incumbent LECs who force CLECs to arbitrate threshold interconnection issues in multiple states. Incumbents may thereby exhaust the resources of smaller competitors, such as Hyperion. Incumbents no doubt will employ threshold issues as "bargaining chips" to secure concessions on more disputed negotiation topics, such as pricing of interconnection and unbundled network elements. If different interconnection standards are allowed to develop from state to state, in the absence of minimum national interconnection standards, it will be more difficult for CLECs like Hyperion to enter multiple markets to compete with regional incumbent LECs. The Commission's rules should resolve threshold issues for the nation to allow parties to focus on the major points of contention and arrive at agreements more expeditiously.

B. The Commission Must Define the Duty to Negotiate in Good Faith (NPRM, ¶¶ 46-48)

The Commission must fashion rules to enforce the duty to negotiate in good faith under Sec. 251(c)(1). Paras. 46-47. In the absence of an enforcement mechanism, nothing would prevent incumbent LECs using Sec. 252 negotiations as a vehicle for delay. In the NPRM, the Commission cites *Southern Pacific Communications Co. v. American Tel. & Tel.*[7] as possible precedent to apply as it interprets Sec. 251(c)(1). Para. 47, note 61. While *Southern Pacific Communications* contains some discussion of what constitutes good faith negotiations, the case is not part of any general line of precedent upon which the Commission should rely.[8]

Hyperion suggests that the Commission look to the labor law context for guidance in implementing Sec. 251(c)(1). Federal courts and the National Labor Relations Board have crafted rules on good faith negotiations for well over forty years. Without attempting to summarize this extensive line of precedent here, Hyperion merely notes that federal courts have tackled the problem that the Commission may soon face: determining when an incumbent LEC is negotiating in bad faith from the content of its proposals at the bargaining table. With sophisticated parties, such as incumbent LECs, the only evidence of bad faith may be the substantive content of their proposals.[9] In *NLRB v. A-1 King Size Sandwiches, Inc.*, the court found that the employer negotiated in bad faith

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[7] 556 F.Supp. 825 (D.D.C. 1983).

[8] *Southern Pacific Communications* is a Sherman Act attempted monopolization case. There, the court merely examined whether AT&T engaged in good faith negotiations as part of the court's overall inquiry into AT&T's alleged coercive, monopolistic behavior. 556 F.Supp. at 1006-08. There is no general line of precedent under the antitrust laws that defines good faith negotiations.

[9] *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979).

because "of the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable."[10] The Commission's rules on good faith negotiations must be prepared to deal with similar tactics on the part of incumbent LECs.

C. All Terms of Negotiated Agreements Must Be Available to Requesting Carriers (NPRM, ¶¶ 269-72)

The Commission rightly concludes that Sec. 252(i) is the Act's primary weapon against discrimination. Para. 269. It provides that:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Sec. 252(i). Therefore, it is troubling that the Commission invites comment on a "similarly-situated-carrier" limitation for Sec. 252(i). Para. 270. Such a requirement has immense potential to discriminate against new entrants. Incumbent LECs could hinder the entry of new competitors into the market by refusing to make the terms of existing agreements available on the grounds that the requesting carrier is not 'similarly situated." Such a test would invite discrimination by incumbent LECs among new entrants, and permit the use of this nebulous test as a pretext to allow certain (and perhaps less competitive) new entrants to interconnect but not others. Given the vast array of technologies in service in the telecommunications market today, an argument can always be made that a particular carrier is not situated in a manner similar to the original party to the agreement. As the Commission notes, the language of the Act does not support distinguishing between carriers for purposes of Sec. 252(i). Para. 270. Hyperion submits that the Commission cannot ignore the plain and unambiguous language of the Act by implying additional requirements.

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[10] 732 F.2d 872, 877 (11th Cir.), *cert. denied*, 469 U.S. 1035 (1984).

Hyperion strongly supports the Commission's tentative conclusion that the language of Sec. 252(i) precludes differentiating among carriers.

The Commission asks whether Sec. 252(i) permits requesting carriers to access individual terms of agreements, as opposed to entire agreements. Para. 271. Again, Hyperion urges the Commission to follow the plain language of the Act. Section 252(i) commands incumbent LECs to "make available *any* interconnection, service, or network element provided under an agreement approved under [Sec. 252] to which it is a party . . .." (Emphasis added.) Unquestionably, Congress wanted requesting carriers to be able to access "any interconnection, service, or network element" without having to accept every term of an agreement. Otherwise, Congress would have phrased Sec. 252(i) merely to require ILECs to make existing agreements available to requesting carriers. Congress cannot be presumed to have used more specific wording by accident. The Commission must give effect to the Act's plain meaning.[11]

D. Technically Feasible Points of Interconnection (¶¶ 56-59)

Hyperion believes that a "technically feasible point of interconnection" is any point on an incumbent LEC's network where suitable transmission facilities are present to permit the routing of traffic to and from another network. From a physical standpoint, interconnection merely requires the joining of wires or of optical fibers, which can take place at any physical location to which both carriers have access. From a technical standpoint, these wires or fibers must be attached (at each end) to compatible transmission equipment, so that signals may be sent and received over the

[11] *See Caminetti v. U.S.*, 37 S.Ct. 192, 194 (1917) (if the meaning of a statute is plain from its language, "the sole function of the court is to enforce it according to its terms.") Of course, this rule of statutory construction is equally applicable to the Commission's implementation of the Act in this rulemaking.

facility. This equipment need not be (although it could be) located at the physical collocated at a point of interconnection. Hyperion agrees with the tentative conclusion in para. 58 that because the statute imposes an affirmative obligation on incumbent LECs to provide interconnection "at any technically feasible point" within their networks that in the event of a dispute the incumbent LEC should have the burden of "demonstrating that interconnection at a particular point is technically infeasible."

Hyperion agrees with the suggestion in para. 57 that interconnection at a particular point should be considered technically feasible if the incumbent LEC currently provides, or has provided in the past, interconnection to any other carrier at that point. The Commission should emphasize, however, that this is strictly a "minimum" standard, as stated in the *NPRM*, and does not preclude nor create a presumption against interconnection at other locations. Further, the Commission should clarify that "a particular point" for this purpose refers to all locations having similar characteristics, and not to specific geographic locations. For instance, if an incumbent LEC currently has meet-point (or other) arrangements with other carriers consisting of fiber splices on telephone poles, it should be required to enter into similar arrangements on *any* telephone pole where suitable hardware for the connection exists, not just on the particular poles where existing splices happen to be located.

Hyperion operates in New York state and is familiar with the interconnection policies of the New York Public Service Commission discussed in para. 59. As such, Hyperion strongly endorses the *NYPSC Interconnection Order* discussed in para. 59 which deems reasonable interconnection points ranging from the incumbent LEC's premises to the requesting carrier's premises, including any point in-between. Under the New York regime, no interconnection point is a requirement; the parties are to negotiate their interconnection points. *See* para. 59. Since this is not a mandatory

requirement, but is more illustrative in nature, Hyperion believes that New York's state policy does not conflict with Sec. 251(c)(2)(B) of the Act. In fact, the Commission should adopt a rule which specifically allows the new entrant to request a point of interconnection from a range of interconnection options (including a continuum from the requesting carrier's premises, points in-between and to the incumbent LEC's premises) that are "technically feasible" for the incumbent LEC. Such a rule will encourage the entry of facilities-based local competition, particularly in more rural, low population density areas.

E. Relationship Between Interconnection and Other Obligations Under the 1996 Act (¶¶ 64-65)

Hyperion agrees with the tentative conclusion in para. 65 that the Commission can (and should) require LECs to offer a variety of forms of interconnection, including virtual collocation and meet-point arrangements, in addition to physical collocation. Sec. 251(c)(6) requires incumbent LECs to offer physical collocation "of equipment necessary for interconnection or access to unbundled networks[.]" Thus Congress identified physical collocation as a particular means of achieving interconnection or access to unbundled elements, but not the exclusive means (because, if it were the exclusive means, then subsections (c)(2) and (c)(3) would not have been required). In interpreting this provision, the Commission must bear in mind the circumstances under which Congress acted. In 1992, the Commission adopted rules requiring physical collocation, which were vacated by the United States Court of Appeals on the specific ground that the Commission lacked statutory authority, under the Act as then in effect, to compel physical collocation.[12] Congress undoubtedly realized that an explicit reference to physical collocation in the 1996 Act was necessary

[12] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

to overrule the *Bell Atlantic* decision and to provide the Commission with the authority that had previously been lacking. However, under these circumstances, no inference can reasonably be drawn that Congress intended any limitation on the Commission's authority to require forms of interconnection other than physical collocation (especially in light of Sec. 251(i)).

Because Sec. 251(c)(2) and (c)(3) require incumbent LECs to provide interconnection and access to unbundled network elements "at any technically feasible point," it is reasonable to infer that the party requesting these arrangements is entitled to specify the place and type of interconnection that it desires, and that the incumbent LEC has an obligation to honor this request unless it can demonstrate that doing so would be technically infeasible. The Commission therefore need not attempt to specify a comprehensive list of permissible types of interconnection (although, at a minimum, physical collocation must be available, and virtual collocation and meet point options should also be required).

IV. COLLOCATION (¶¶ 66-73)

A. The Commission Should Adopt Rules Which Specifically Permit Virtual Collocation for Carriers In Order to Encourage The Development of Local Competition

Hyperion generally agrees with the Commission in para. 66 concerning its reading of Sec. 251(c)(6) insofar as the Act *requires* the incumbent LEC to provide physical collocation at the incumbent LEC's premises. The Act also envisions, and in fact encourages, virtual collocation upon a showing by the incumbent LEC to the State Commission that "physical collocation is not practical for technical reasons or because of space limitations." Sec. 251(c)(6). However, where physical collocation is appropriate, Hyperion urges the Commission to define "premises of the local exchange carrier" for collocation purposes. The definition should include, but not be limited to, those

locations included in para. 71, consisting of LEC central offices, tandem offices, all LEC buildings or similar structures (whether owned or leased) which house LEC network facilities, including LEC network facilities located on public rights of way, subject to the requirements of "technical feasibility" and "space availability" contained in Sec. 251(c)(6).

Consistent with the Commission's tentative conclusion in the *NPRM* that it should adopt national standards where appropriate to implement the collocation requirements of the Act, the Commission should consider and be guided by its objective (ostensibly shared by Congress) to "*facilitate entry by competitors in multiple states* by removing the need to comply with a patchwork of state variations in technical and procedural requirements." Para. 67 (Emphasis added.) Any uniform collocation standards that the Commission establishes must also be consistent with the Act's directive that collocation "rates, terms, and conditions...are just, reasonable, and nondiscriminatory...." *See* Sec. 251(c)(6).

For any collocation standard to meet this test, Hyperion believes that it is vitally important for the Commission to adopt a national collocation rule which recognizes that while Congress established physical collocation as a *minimum* requirement of the incumbent LECs under Sec. 251(c)(6) of the Act (absent a showing of hardship), Congress did not intend that physical collocation at an incumbent LEC's premises be the only collocation point available to the new entrant. Accordingly, the Commission should adopt a rule providing that it is up to the new entrant requesting collocation of its equipment to specify an interconnection point that is "technically feasible" for both the new entrant and the incumbent LEC. A heavy burden should then be on the incumbent LEC to demonstrate why the new entrant's proposed collocation point is not "technically feasible" or that no space is available. Such a rule would promote Congress's intention of promoting

local exchange competition by giving new entrants needed flexibility in collocating their equipment with the incumbent LECs and reducing unnecessary costs and burdens for the new entrant. It would also be consistent with the letter of the Act by still conforming to the twin guideposts of "technical feasibility" and "space availability." If physical collocation at an incumbent LEC's premises were the *first choice* for collocation, and up to the incumbent LEC to decide in the first instance in every LATA, this would work substantial, unnecessary costs upon new entrant carriers serving rural, low population density areas in many states.

On the other hand, virtual collocation can be provided by incumbent LECs to new entrants via their ubiquitous network at any number of locations beyond the premises of a LEC which are "technically feasible" and thus consistent with the Act. Small carriers such as Hyperion lack the financial resources to make the economic investment necessary for physical collocation at every end office of an incumbent LEC in order to interconnect or obtain access to unbundled network elements. This is an especially costly and impractical scenario in rural, low-population areas. A liberal definition of virtual collocation would promote local exchange competition in rural areas -- precisely where competition should be encouraged.

Accordingly, Hyperion urges the Commission to adopt a national, uniform rule, similar to the trend in many states such as Illinois and Washington, which specifically permit virtual collocation, discussed by the Commission in para. 69.[13] The Commission's rules should give the option to the requesting new entrant initially to specify the point of physical or virtual collocation (or meet-point arrangement), provided that it is at a technically feasible location, and there is space

[13] See Washington Utilities and Transportation Commission, Fourth Supplemental Order, Docket UT-941464 et al. (Oct. 1995).

available.[14] The rule should provide that the details of such arrangements should be negotiated between the parties, with any disputes to be decided by the State Commission in conformity with the Act and this Commission's rules. In addition, as in the State of Washington, virtual collocation costs should be capped at the rate for physical collocation. See para. 69. The adoption of such virtual collocation rules would substantially meet the needs of Hyperion and other new entrants by eliminating unnecessary costs particularly in rural LATAs with low population density, while not unduly burdening the incumbent LECs.

V. UNBUNDLED NETWORK ELEMENTS (NPRM, ¶¶ 74-116)

A. The Act Does Not Permit States to Require New Entrants to Unbundle Their Network Elements (NPRM, ¶ 78)

Even though the Commission apparently agrees that the Act does not compel new entrants to unbundled their network elements,[15] its rules should also emphasize that state commission,

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[14] The rule needs to be broad enough to include meet-point interconnection and any other form of interconnection. The Commission should keep in mind that technology will continue to evolve. The primary point is that the Commission should not unintentionally limit efficient technological options.

[15] Because paragraphs 74 through 116 of the NPRM discuss only what rules should govern the incumbent's unbundling of network elements, Hyperion assumes that the Commission agrees that the Act does not require, nor even address, any network unbundling by new entrants. *See also*, Sect. 251(c)(e)(3) (specifying "Unbundled Access" among the "Additional Obligations of Incumbent Local Exchange Carriers.").

enforcing "other requirements of state law," should not order new entrants to unbundle.[16] Para. 78. Through Secs. 251(a) and (b) Congress carefully balanced the responsibilities of "All Local Exchange Carriers" versus those of "Incumbent Local Exchange Carriers." Congress's decision to obligate only incumbent LECs to unbundle -- and not all LECs -- cannot be viewed as an oversight. Congress limited the unbundling obligation to carriers that clearly possess bottleneck facilities.[17] States should not be permitted to impose unnecessary unbundling requirements upon new entrants. State commissions should not be permitted to impose overly burdensome requirements upon new entrants (such as requiring new entrants to file tariffs on unbundled elements) upon entry to the local exchange market. Any attempt by State commissions to impose unbundling requirements on new entrants would upset the statutory scheme envisioned by Congress and would trigger the Commission's preemption powers under Sec. 251(d)(3).[18] To avoid the situation where incumbent LECs might overwhelm a new entrant with requests for unbundling, Hyperion recommends that the Commission's rules prohibit such requests. There is certainly no reason why new entrants cannot respond to legitimate unbundling requests, when necessary, and provide unbundled elements at a

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[16] Some states, such as Colorado, have already issued rules that would apply the Act's "Additional Obligations of Incumbent Local Exchange Carriers" to new entrants after an arbitrary three-year time period. *In the Matter of Proposed Rules Regarding Implementation of §§ 40-15-101 Et Seq. -- Resale of Regulated Telecommunications Services*, Order Adopting Rules, Docket No. 95R-557T, Decision No. C96-751 (adopting rules 4 CCR 723-4-2.2 & 7-23-40-3.6 that would apply the Act's resale obligations to new entrants as *presumptive* incumbent LECs within three years of a new entrant's certification.

[17] To account for the remote possibility that some new entrants might possess monopoly facilities now or, more likely, at some point in the future, Congress provided a methodology for the Commission to consider whether non-incumbent LECs should be treated as incumbents (for the purposes of Sect. 251) under Sect. 251(h)(2).

[18] As explained above, Sect. 251(d)(3) preserves only those state access requirements that are consistent with Sec. 251 and do not substantially impair its implementation.

reasonable price, but the Commission should not allow incumbent LECs to burden or harass new entrants with unnecessary unbundling requests for anticompetitive purposes.

B. The Term "Network Elements" Comprises Both Combinations of Elements and Individual Elements (NPRM, ¶ 83)

In response to the Commission's inquiry regarding the scope of the term "network element" (Para. 83), Hyperion believes that the term encompasses both combinations of elements, like the local loop, and individual elements, or all facilities necessary from the incumbent LEC's network to point of interconnection. Congress defined "network elements" as "a facility or equipment used in the provision of a telecommunications service." Sec. 3(a)(2). This extraordinarily broad definition easily covers any piece of telecommunications equipment that somehow may be differentiated from other equipment. Within the definition of network element, Congress also included combinations of elements that might be "features, functions, or capabilities that are provided by means of" the "facility or equipment" that is first defined as a network element in Sec. 3(a)(2). Thus, Hyperion believes that a liberal definition of network elements should be adopted allowing for particular network elements (such as a local loop) to be combined or subdivided into other network elements to accommodate the particular needs of the facilities-based entrant. This will serve to increase the efficient provision of competitive services by the facilities-based new entrant and encourage price competition with incumbent LECs, benefiting enduser consumers.

VI. PRICING

A. The Act, and the Commission's Rules, Function as a National Standard for Pricing Interconnection and Unbundled Elements Under Sec. 252(d) (NPRM, ¶¶ 117-19)

As noted earlier, the pricing of interconnection and unbundled elements is constrained by the national standard created in Sec. 252(e)(6). The Commission has authority to promulgate rules that

will also serve as a national pricing standard. Even though the Act explicitly instructs the Commission to issue rules only as to Sec. 251, not Sec. 252(d), the Commission must nonetheless interpret Sec. 252(d) as it rules on Sec. 251. In the NPRM, the Commission correctly notes that Secs. 251(c)(2), (3) and (6) each require rates for interconnection, unbundled elements and collocation to be just, reasonable, and nondiscriminatory. Para. 117. As it formulates rules to implement these rate standards under Sec. 251, the Commission cannot avoid construing the pricing standards under Sec. 252(d). In fact, the rate standards for interconnection and unbundling in Sec. 251 specifically refer to Sec 252. Secs. 251(c)(2)&(3). Hyperion thus concurs with the Commission's tentative conclusion to issue rules under Sec. 252(d). Para. 118.

Hyperion supports the Commission's tentative conclusion that it also has authority to define, via this rulemaking, costing methodologies and resulting rate structures for unbundled elements. Para. 117. Since these terms are expressly referenced in Secs. 251(c)(4) and (b)(5), respectively, the Commission's authority to promulgate rules under Sec. 251 extends to defining these terms in the context of Sec. 252(d).

B. Pricing of Collocation and Unbundled Elements Should be Set on a Cost-Basis, With No Allocation for Contribution (NPRM, ¶ 121)

In carrying out its task of devising national pricing standards, the Commission should be guided by the principal that prices for collocation and unbundled network elements should be set at incremental cost, in accordance with Sec. 252(d)(1). The Commission cannot tolerate State commissions inserting contribution for joint, common, or overhead costs into these prices. Although Sec. 252(d)(1) permits incumbent LECs to receive a "reasonable profit," contribution has no place in the new competitive framework established by the Act.

In competitive markets, carriers fund their overhead, joint and common costs through retail rates, not by selling essential inputs to competitors at inflated prices. Allowing incumbent LECs to recover contribution in the prices of collocation and unbundled network elements gives incumbent LECs an undue advantage in the marketplace. Incumbent LECs are much more able to place new entrants in a price squeeze when the costs of essential inputs are inflated with contribution and more closely approach retail rates. Customers suffer indirectly as a result of the weakened state of competitors in the market and directly through inability of new entrants to offer competitively lower prices. The prices of new entrants' retail offerings must include not only contribution for the carrier's own operations, but also contribution for the incumbent. Customers reap little benefit from the increased efficiencies of the new entrant's network, for its prices incorporate the inefficiencies of the incumbent's network. Because the incumbent is guaranteed recovery of contribution, it lacks incentives to maximize the efficiency of its operations to compete with new entrants. The ability of the market to lower the prices of monopolist incumbent LECs and boost overall efficiency is dulled in a regime where incumbents can look to their competitors for contribution.

C. Carriers Should Exchange Traffic on a Bill and Keep Basis (NPRM, ¶¶ 239-43)

1. The FCC and State Commissions Have Authority to Require Bill and Keep (NPRM, ¶ 243)

The Act directly recognizes the power of the Commission and state commissions to impose bill and keep arrangements on competitors in the local exchange market. Sec. 252(d)(2)(B)(i). Some incumbent LECs argue that Sec. 252(d)(2)(B)(i) does nothing more than authorize state commissions to approve agreements negotiated under Sec. 252 that include bill and keep arrangements. But, as the Commission properly notes (Para. 243), Sec. 252(d)(2)(B)(i) is entirely